CHOOI SOW FUN (F) & ANOR

v.

LEMBAGA PERANCANG KELUARGA NEGARA

HIGH COURT MALAYA, KUALA LUMPUR
RAHMAH HUSSAIN J
[CIVIL SUIT NO: F243-1985]
31 OCTOBER 2000

CONTRACT: *Damages - Payment for work done - Whether recovery of professional fees constitutes special damages - Whether plaintiff entitled for payment based on estimated costs*

CONTRACT: *Recovery for work done - Professional fees, services - Claim for work done up to Stage 3(iv) of the Conditions of Engagement and Scale of Professional Charges - Whether building plan approval required before Stage 3(iv)*

CIVIL PROCEDURE: *Amendment - Pleadings - New claim not pleaded, particularised or amended - Whether fatal*

The plaintiffs, as substitutes of the deceased plaintiff architect, claimed for the recovery of professional fees and services due and owing by the defendant, for work done by the plaintiff up to Stage 3(iv) of the 'Conditions of Engagement and Scale of Professional Charges.'

The defendant argued the following: (i) the sum claimed by the plaintiff had been changed however no application was made to amend the claim; (ii) the sum claimed was for special damages and should have been pleaded with full particularity; and (iii) the building plan approval had to be obtained before Stage 3(iv) but it was not obtained. Further evidence and the wording of Stage 3(iii) showed that the building plan approval should have been obtained under Stage 3(iii).

In reply to the above the plaintiff claimed: (i) special damages arise in personal injury suits and where actual damage has been caused under tort or contract. Here, judgment is sought for outstanding fees for professional work done and services rendered by the plaintiff; and (ii) it is immaterial whether building plan approval had or had not been obtained so long as the plaintiff had prepared "sufficient drawings for the purpose of submitting to the appropriate authority to obtain building approval" as per Stage 3(iii). Nowhere in Stage 3(iii) does it place the burden on the plaintiff to guarantee the issuance of the building approval.

The plaintiff further produced an expert witness who confirmed that building approval is not required for work at Stage (iv).

Held:

[1] The plaintiff's claim in this case is for professional fees for work done and professional services rendered by the plaintiff to the defendant and not for special damages arising out of personal injury. Also from the defendant's quantity surveyor and from a series of correspondences it is clear that the computation of the estimated costs was well within the defendant's full knowledge. Furthermore in the case *KC Lim & Associates v. Pembenaan Udarama Sdn Bhd* the Federal Court upheld the principle that the architects were entitled to be paid professional fees based on the estimated cost of construction on the date the project was abandoned by the defendants.

[2] Based on documentary evidence the plaintiff had prepared "sufficient drawings" and those drawings had been duly approved, accepted and signed by the defendant. Also the drawings and plans were approved by DBKL. Furthermore based on the evidence of the plaintiff's expert witness and the evidence as a whole the plaintiff is entitled to claim for professional fees for work done and professional services rendered within the scope of works set out in Stage 3(iv).

[3] The plaintiff's claim under Stage 3(iv) and not Stage 3(iii) is allowed in view of cl. 3(viii) of the 'Mode, Time & Payment and Partial Services' which provides should the work performed fall between the stages of work set out then the fee chargeable shall be the percentage chargeable for the stages at the higher level.

[4] On the plaintiff's failure to amend his pleading it is not fatal as the plaintiff had to adjust his claim based on PW2's (quantity surveyor) evidence. Furthermore since the amount now claimed is less than the previous amount it has not caused any prejudice or loss to the defendant.

[Plaintiff's claim allowed.]

Case(s) referred to:

Ilkiw v. Samuels [1963] 1 WLR 99 ***(refd)***
KC Lim & Associates v. Pembenaan Udarama Sdn Bhd [1980] 2 MLJ 26 ***(foll)***
Perestrello e Companhia Limitada v. United Paint Co Ltd [1969] 1 WLR 570 ***(refd)***
Soon Nam Co Ltd v. Archynamics Architects [1979] 1 MLJ 212 ***(refd)***

For the plaintiff - Gurdip Singh; M/s Jagjit Singh & Co
For the defendant - Zainur Zakaria; M/s Zainur Zakaria & Co

Reported by Sherin Kunhibava

JUDGMENT

Rahmah Hussain J:

The plaintiff, Chan Hong Kan a registered architect, instituted this suit for recovery of professional fees due and owing by the defendant amounting to RM259,162.50 together with accrued interest and costs. He died on 13 April 1988. After obtaining the grant of letters of administration *vide* Petition No. S6-45-568-88, from the Kuala Lumpur High Court on 21 March 1989, the widow Chooi Sow Fun (PW1) and Lum Hoong, both as administrators of the estate of Chan Hong Kam, deceased, were substituted as the plaintiffs in the suit *vide* Order of Court dated 29 June 1990.

To facilitate a prompt disposal of this case the court suggested and both parties agreed that the evidence in chief of the plaintiff's witnesses be in the form of written statements and these were duly marked in court as follows:

(1) PW1, Madam Chooi Sow Fun (f) who is the widow of the deceased plaintiff architect, Chan Hon Kan as KSP1;

(2) PW2, Mr. Loh Siow King who was at all material times the Quantity Surveyor appointed by the defendant as KSP2;

(3) PW3, Mr. K.C. Leong who was called as an expert witness as KSP3.

It is submitted on behalf of the plaintiff that based on the documentary and oral evidence adduced in court, the plaintiff has succeeded in proving the plaintiff's case well beyond that of a balance of probabilities. According to learned counsel, the defendant's sole witness did not have any personal knowledge and could not give any evidence by way of defence to rebut the plaintiff's case. He added that the defendant's sole witness also did not lead any evidence to substantiate the defendant's counter-claim against the plaintiff.

However it is submitted on behalf of the defendant that no particulars were provided as to the basis of the plaintiff's claim of RM491,037.50. Furthermore based on the written submission of learned counsel for the plaintiff, the plaintiff's claim has now been changed to the sum of RM259,162.50. He also says that since no application to amend the claim was made by the plaintiff he wishes to raise a preliminary point on this matter.

Learned counsel goes on to say that the law with regard to claim for special damage is clear. That is, that special damage must be pleaded with full particularity because in contrast to general damage, the law does not presume it to be the natural and probable consequence of the wrong suffered. It is special damage because it is damage which arises in special circumstances. He then refers to the case of *Ilkiw v. Samuels* [1963] 1 WLR 99 at p. 106 whereby Diplock LJ has this to say:

> In my view, it is plain law – so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last 100 years – that you can recover in an action only special damage which has **been pleaded, and, of course, proved.** (Jeffrey Pinsler – *Civil Law and Practice in Malaysia* – Vol. 1 Chap. lx page 6).

Learned counsel adds, the rationale of the rule was explained by Lord Donovon in *Perestrello e Companhia Limitada v. United Paint Co. Ltd.* [1969] 1 WLR 570 at p. 579:

> ... if a Plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the Defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the Defendant the case he has to meet and assisting him in computing a payment into Court. (Jefferey Pinsler – same page paragraph 49)

In reply, learned counsel for the plaintiff states that a claim for special damages usually arises in personal injury suits and where actual loss and damage has been caused under the Tort of Negligence or Contract and in fairness to the defendant requires that it be specifically pleaded. But in the case before me, he says the claim for which the plaintiff now seeks judgment is one for outstanding fees for professional work done and services rendered by the plaintiff to the defendant from 1973 to 18 August 1981.

After giving due consideration to the submissions of both learned counsel on this point, I am satisfied that the preliminary objection is devoid of merits as the plaintiff's claim in this case is for professional fees for work done and professional services rendered by the plaintiff to the defendant and not for special damages arising out of personal injury. Furthermore PW2, the defendant's quantity surveyor has given evidence that the estimated cost of the construction for the project as at the date of termination (18 August 1981) to be RM11,900. Prior to the trial he had also sent a letter dated 20 September 1995 stating the estimated cost of the construction for the project as at 18 August 1981 was RM11,900,000. (See p. 16 – bundle D). It is also clear from the series of correspondence namely at pp. 112, 114, 116, 122, 124, 126, 128, 129, 132 and 166 of defendant's bundle of documents – E, that the computation was within the defendant's full knowledge.

Finally in the Federal Court case of *K.C. Lim & Associates v. Pembenaan Udarama Sdn. Bhd.* [1980] 2 MLJ 26 (FC), the Federal Court upheld the principle that the plaintiff's architects were entitled to be paid professional fees based on the estimated cost of construction on the date the project was abandoned by the defendants.

Reverting now to the case proper it appears from the evidence adduced by the plaintiff, that the plaintiff is claiming for professional fees for work done up to Stage 3(iv) of the Conditions of Engagement and Scale of Professional Charges (p. 61 – bundle B). Stage 3(iv) provides:

> For taking client's instructions, preparing sketch designs, making approximate estimate of cost by cubic measurement or otherwise, and preparing working drawings, specification, or such other particulars as may be necessary for the preparation of bills of quantities by an independent quantity surveyor, or for the purpose of obtaining tenders, the fee shall be two thirds of the appropriate percentage due on the estimated costs of such works.

It is the defendant's submission that the plaintiff's claim is clearly flawed and erroneous. The reason being that up to the date when the services of the plaintiff was terminated that is, in August 1981 no building approval had been obtained. Furthermore the work described in Stage 3(iv) are work performed for the purpose of calling tenders. Thus he concludes that there is no dispute that the nature of work in Stage 3(iv) is work undertaken for the purpose of calling tenders. And tenders are only called after building plans have been approved. As such building plan approval has to be obtained before Stage 3(iv). Finally it is also submitted by learned counsel for the defendant that the evidence and the wording of Stage 3(iii) shows beyond doubt that the building plan approval has to be obtained under Stage 3(iii).

In reply learned counsel for the plaintiff states that for the purposes of the plaintiff's claim, it is immaterial whether Building Plans Approval had or had not been obtained so long as the plaintiff had prepared "sufficient drawings for the purpose of submitting to the appropriate authority to obtain building approval" as per Stage 3(iii). (See p. 61 – Bundle B)

He adds that the vital words are that the plaintiff must have prepared "sufficient drawings" for submission to Dewan Bandaraya Kuala Lumpur (DBKL) in order "to obtain building approval". Nowhere in Stage 3(iii) does it place the burden on the plaintiff to guarantee the issuance of the Building Approval.

Learned counsel then refers to the Singapore Court of Appeal case of *Soon Nam Co. Ltd. v. Archynamics Architects* [1979] 1 MLJ 212 (CA). The judge held at p. 213 as follows:

> "In principle" approval is not a requirement for the application of Clause 3(ii). What is required is that the plans should be sufficient for "application to be made for planning approval and for 'in principle' approval". The Plaintiffs had clearly complied with this requirement and they had in fact submitted plans for 'in principle' approval.
>
> In any case, the work done by them was in excess of that required under Clause 3(i) and by virtue of the provisions of Clause 3(viii) they were entitled to payment under Clause 3(ii) i.e. one-third of eight per cent of the estimated cost of the Project.

Thus, in the present case, based on the documentary evidence at p. 8 of bundle C and pp. 5 & 6 of bundle H, I am satisfied that the plaintiff had prepared "sufficient drawings" and these drawings had been duly approved, accepted and signed by the defendant. Furthermore the Drawings & Plans when submitted to DBKL for approval, were approved on 3 August 1977.

The plaintiff's expert witness (PW3), under cross-examination did clarify on the scope of work of an architect. He was questioned "Do you agree that work at Stage (iv) is done normally after building approval has been obtained?" To which he answered, "I don't agree." When questioned further, "Are these work done after the approval has been given?" He replied "No" and gave his explanation as follows:

> Preparing sufficient drawings are done for purpose of calling for tenders. Stage (iv) does not mention about building approval being obtained or proceeding to construction. It merely states that working drawings and specifications done for calling tenders irrespective of whether tenders are actually called.

Finally during re-examination PW3 said:

> It is our practice to charge clients for work done in Stage (iv) even if building approval has not been obtained. It doesn't mention at all when building approval has to be obtained.

Again, during re-examination PW3 had stressed that the responsibility to obtain the planning and building approvals is not on the architect. He said:

> As far as the architect's professional servuce contract us concerned, the archutect's responsibility is to prepare the relevant documents for applying for the plannung and buildung approvals. The onus of granting an approval rests with the local authority. In the process of considering the application,

> the Authority may ask for further considerations to be complied by the architect and his client. However, as a matter of lime, the Authority will grant the approvals under the statute.

The only witness called by the defendant is Encik Shoib bin Hasnan (DW1). He has no personal knowledge of the events that had taken place between 1973 and 1981 as he was only employed in 1992. DW1 had also not led any evidence whatsoever to rebut the plaintiff's case on a balance of probabilities. Thus, based on the evidence of PW3 which remained unchallenged, and the evidence as a whole I am of the considered opinion that the plaintiff is entitled to claim for Professional Fees for Work Done and Professional Services rendered within the scope of works set out in Stage 3(iv) of the Scope of Works. As such I give judgment to the plaintiff in the sum of RM259,162.50 together with interest at the rate of 8% thereon from the date of filing of the Writ of Summons to the date of judgment and further at 8% per annum to the date of realisation and costs. As regards the defendant's counter-claim I am satisfied that there is not an iota of evidence on record to substantiate the defendant's allegation of over payment. As such it is dismissed with costs.

I allowed the plaintiff's claim under Stage 3(iv) and not Stage 3(iii), in view of cl. 3(viii) of the Mode, Time & Payment and Partial Services (p. 61 – bundle B), which states:

> Should the work performed fall between the stages of work set out above, then the fee chargeable shall be the percentage chargeable for the stages at the higher level.

One last point on the plaintiff's claim, before I go to the defendant's counter-claim and that is whether the plaintiff's present claim of RM259,162.50 (instead of the plaintiff's original claim of RM491,037.50) should be allowed, as it was not pleaded, particularised or amended. Earlier on, I have made my ruling on the particularisation of the claims. However, on the plaintiff's failure to amend his pleading, I am of the opinion that it is not fatal as the plaintiff had to adjust his claim based on PW2's evidence in court (that is the Quantity Surveyor of the defendant's project) who said that the estimated cost of construction for the project as at the date of termination (18 August 1981) was RM11,000,000 instead of RM11,900,000. Earlier in his letter dated 20 September 1995 (see p. 17 – bundle D) he had stated the latter figure. Furthermore since the amount now claimed is less than the previous amount, I am also satisfied that it has not caused any prejudice or loss to the defendant. Therefore to my mind it should be allowed.

For the sake of completeness, the plaintiff's claim based on the estimated cost of construction as at 18 August 1981 is reproduced below:

Cost of works assessed at		RM11,900,000
Professional Fees at 7.5%		RM 892,500
2/3 of RM892,500		RM 595,000
Add: Model & Printing Charges	RM 2,680	
Fees for Amending Plans	RM24,000	RM 26,680
		RM 621,680
Less paid prior to filing of writ of summons		RM140,000.00
		RM481,680.00
Less paid 14.9.82		RM222,517.50
Debt owing by the defendant		RM259,162.50

I had dismissed the defendant's counter-claim as I was satisfied that there was not an iota of evidence on record to substantiate the defendant's allegation of overpayment of RM199,009.68. The one and only witness called by the defendant, that is DW1, did not help much as he had no personal knowledge of all the circumstances and events pertaining to this suit. He had only joined the defendant in 1992.

Thus for the abovesaid reasons, I allowed the plaintiff's claim as prayed and dismissed the defendant's counter-claim with costs.